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FEDERAL COMMUNICATIONS COMMISSION
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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992	)	CS Docket No. 98-82
	)	
Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996	)	CS Docket No. 96-85
	)	
The Commission's Cable Horizontal and Vertical Ownership Limits and Attribution Rules	)	MM Docket No. 92-264
	)	
Review of the Commission's Regulations Governing Attribution Of Broadcast and Cable/MDS Interests	)	MM Docket No. 94-150
	)	
Review of the Commission's Regulations and Policies Affecting Investment In the Broadcast Industry	)	MM Docket No. 92-51
	)	
Reexamination of the Commission's Cross-Interest Policy	)	MM Docket No. 87-154

REPLY COMMENTS OF TIME WARNER CABLE

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Introduction

In its Public Notice concerning the "experimental economics" study conducted by the Commission's Office of Plans and Policy, the Commission asked for comment on "the value of the study in providing empirical evidence relevant to the ownership issues raised in the Commission's pending cable ownership rulemaking proceeding."[1] The comments are in, and they show that proponents and opponents of subscriber limits agree that the *Study* has no such value. Even RCN, the sole commenter that believes that the *Study* may have some value, acknowledges that the *Study* is flawed. This unanimity demonstrates that the *Study* cannot support regulatory intervention: any Commission decision relying on the *Study* even in part would inevitably be set aside as arbitrary and capricious.

Argument

Our opening comments demonstrated that the Commission cannot rely on the *Study* — for three reasons. *First*, the *Study* relies on experiments whose design fails to duplicate key attributes of the real-world video-programming marketplace.[2] The *Study* treats that marketplace as though it were a commodity exchange, ignores competition between cable and DBS, posits concentration ratios that are vastly in excess of anything seen in real life, and mistakenly assumes that the test scores of college students conducting six-minute trading sessions will closely

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[1]*See* Public Notice, *Media Bureau Seeks Comments on Experimental Economics Study Examining Horizontal Concentration in the Cable Industry*, 17 FCC Rcd 10544, 10544 (2002); Mark M. Bykowsky, *et al.*, Office of Plans and Policy, FCC, OPP Working Paper Series No. 35 — *Horizontal Concentration in the Cable Television Industry: An Experimental Analysis* (rev. July 2002) ("*Study*").

[2]*See* Supplemental Comments of Time Warner Cable ("Time Warner Comments") at 5-8.

approximate the real-live track records of professional buyers and sellers hammering out agreements in drawn-out negotiations.

Second, statistically speaking, the *Study* walks on paper-thin ice.[3] The *Study* uses five-student samples — so small that an unlucky draw of a few uninterested or sleep-deprived students can affect the results much more strongly than the concentration variable whose impact the *Study*'s experiments were supposed to measure. Even if one could technically call differences among samples this small "statistically significant," no responsible statistician would champion real-world regulatory intervention on a statistical foundation this feeble.

Finally, the *Study* does not support regulatory intervention even if one takes its experiments' results at face value.[4] It makes no sense to attach weight to a small number of differences that are supposedly statistically significant even when the vast majority of results admittedly yields no statistically significant differences.[5] Besides, in the two cases where the *Study* finds statistically significant differences between differently concentrated scenarios, the results are ambiguous at best: for example, although the results indicate that efficiency decreases

[3] *See id.* at 8-13.

[4] *See id.* at 13-16.

[5] As our opening comments explained (at 3, 13), the *Study*'s authors attach weight to one supposedly statistically significant difference among 12 number pairs — even when the other 11 pairs show no statistically significant differences. Whenever anyone conducts 12 statistical tests, the likelihood of obtaining at least one "false positive" (that is, a finding of a statistically significant difference when there is no true difference between populations) is high. At a 90% confidence level (the level apparently used by the authors), the odds are $1 - 0.90^{12} = 72\%$. There is thus a strong chance that the one comparison that came up "statistically significant" is simply a fluke.

between the least and more concentrated scenarios, they also show that efficiency increases between the more and most concentrated scenarios.

For all these reasons, virtually all commenters agree with Time Warner that the *Study* cannot place any weight on the scale whatsoever. AT&T explains that the *Study* "has no buyer market power predictive value and provides no non-conjectural basis for any cable ownership limit."[6] Comcast shows that "the results of this particular set of experiments are of no value."[7] NCTA concludes that "the limitations of the . . . study, including the gap between their experimental market design and the real-world market for the sale of program services, are sufficiently large that one cannot reach any reliable conclusions about appropriate ownership limits for MVPDs based on [the] study."[8]

Even SBC Communications — which apparently favors a subscriber limit and opposes mergers among major cable operators — agrees that the *Study* is fatally flawed, saying: "Fundamentally, the [*Study*] fails to reflect the real world and, as a result, is of no practical use."[9] As SBC explains, none of the experimental treatments "comes close to reflecting the market structure" of the MVPD industry.[10] For example, SBC correctly notes that the *Study*'s authors hypothesize a market in which concentration is much higher than in the real-world MVPD

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[6]Supplemental Comments of AT&T Corp. ("AT&T Comments") at 6.

[7]Comments of Comcast Corporation ("Comcast Comments") at 3.

[8]National Cable & Telecommunications Association Comments ("NCTA Comments") at 1 (quoting Carl Shapiro & John Woodbury, *Cable Television Subscriber Limits: A Critique* (July 18, 2002)).

[9]Comments of SBC Communications Inc. ("SBC Comments") at 1.

[10]*Id.* at 5.

industry, and that there is no way to be sure that an increase in concentration would have the same effect in a less concentrated environment.[11] As SBC explains, the *Study*'s "unrealistic" concentration scenarios therefore do "not provide much, if any, guidance" on the impact of concentration in the real world.[12] Plainly, one cannot rule out that, at more realistic levels, increased concentration would have merely beneficial consequences.

Only RCN contends that the *Study* has some merit. But, even while RCN contends that the *Study* "confirm[s] . . . that incumbent cable operators' monopoly and monopsony power affects the ability of competing multichannel video programming distributors ("MVPDs") to obtain access to video programming at fair market prices,"[13] RCN acknowledges that the *Study* fails to take account of significant real-world market attributes: as RCN puts it, "there are several deficiencies in the [*Study*'s] underlying methodology."[14] Thus, RCN tries to have it both ways. Insofar as the *Study* supports RCN's view that concentration hurts overbuilders, RCN applauds the *Study* as accurately depicting real life. Insofar as the *Study* shows that increased concentration has no effects at all, RCN denounces it as simply unreliable. This is self-serving opportunism, not persuasive argument: RCN points to no reason why a flawed study would nevertheless produce reliable results, nor why the flaws would skew the outcome in one direction only.

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[11] *Id.* at 5-6.

[12] *Id.* at 6. AT&T, Comcast, NCTA, and Time Warner flag this problem as well. *See* AT&T Comments at 6-12; Comcast Comments at 6-14; NCTA Comment at 1-2; Time Warner Comments at 5-8.

[13] Comments of RCN Telecom Services, Inc. at 2

[14] *Id.* at 2-3.

Conclusion

For the reasons set forth above, the Commission should attach no weight to the *Study*'s conclusions.

Respectfully submitted,

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